Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-888

AVCO COMMUNITY DEVELOPERS, INC.,

Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION, an agency of the State of California, and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION, an agency of the State of California,

Appellees.

On Appeal From the Supreme Court of the State of California.

RESPONSE TO MOTION TO DISMISS OR AFFIRM.

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,
9665 Wilshire Boulevard,
Seventh Floor,
Beverly Hills, Calif. 90212,
(213) 878-2654, 278-6500,
Attorneys for Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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I.
Introduction.

Appellees, SOUTH COAST REGIONAL COMMISSION and CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION (the "Commissions"), have filed a Motion to Dismiss or Affirm in the above-entitled matter. Appellant, AVCO COMMUNITY DEVELOPERS, INC. ("Avco") contends that the Commissions misunderstand Avco's legal theory on appeal and that the Motion to Dismiss or Affirm contains misleading statements.

The remainder of this brief will address these issues seriatim.

II.

Avco Has a Vested Right to Previously Approved Uses of Tract 7479.

In its Jurisdictional Statement at 9-17 Avco contended that a developer who has substantially and in good faith relied on governmental approvals of specific uses and densities for the construction of a residential development, but where no permit to construct specific buildings has been issued, nevertheless has a vested right to those previously approved uses. This is also the essence of the first question presented to this Court. (Jurisdictional Statement at 4.)

The Commissions assume the validity of their conclusion that it is impossible to gain such a vested right absent a building permit. (Motion to Dismiss or Affirm at 2.) In doing so they disregard both the existence and the rationale of the several cases to the contrary cited in the Jurisdictional Statement at 11-16.

The Commissions' logical fallacy of assuming the conclusion has also led them to argue that Avco did no more than manufacture lots under the permits granted and therefore could not have a vested right to anything more. (Motion to Dismiss or Affirm at 7-8.) Avco was in precisely the same position as the developer in *Meuser v. Smith*, 74 Ohio L. Abs. 417, 141 N.E.2d 209 (1956). In *Meuser* the developer bought eleven acres of unzoned property intending to use it as a trailer park. The developer then filed a development plan for the park and received a building permit for one of the utility buildings to be constructed on it. Construction work was started (to the extent of excavating and constructing footers) when it was

halted by a temporary restraining order. Thereafter the property was rezoned for agricultural and residential uses, neither of which allowed the property to be used as a trailer park. The court upheld the developer's contention

> ". . . that by starting construction they did establish an 'existing' use within the meaning of the applicable regulation and enabling statutes; that they acquired a vested right to complete such and use the same under the 'due process' clause of the United States Constitution, Amend. 14." 141 N.E.2d at 211.

In other words the developer in *Meuser* had received a permit which allowed the construction of one of the improvements required to make the land suitable for its ultimate use. The utility building had no value standing alone; its value lay in the role it was to play as part of a completed trailer park. The developer's reliance on the permit, combined with the existence of a development plan, was held sufficient to grant the owner a vested right to the *use* of his property which he had intended.

Avco is in precisely the same position. The specific use of each lot, and the maximum intensity of that use, within Tract 7479 had received prior governmental approval. By grading and constructing subdivision improvements on Tract 7479, Avco had commenced the construction of its residential community. Like the developer in *Meuser*, Avco had begun construction of improvements required to effectuate the intended use of Tract 7479 as a residential development. On these facts, combined with the numerous approvals which had been previously granted to Avco, Avco contends

that, like the developer in *Meuser,* it has established an existing use and has a vested right to complete Tract 7479 for the residential use previously approved, up to the densities previously approved.

Avco's contention that it has a vested right to previously approved uses of Tract 7479 does not mean that the property is completely free from other constraints or controls which might be required to protect the public under the government's police powers. Avco is in complete agreement with the statement of the applicable law as found in 2 Antieau, *Municipal Corporation Law* Section 16A.12 at 16A-25 (1973):

> "One in possession of a valid permit should be aware that at any subsequent date he can be exposed lawfully to those police power controls, such as regulations found in fire prevention ordinances, building codes etc., which are necessary to protect the public health, morals, welfare or safety." [Footnote omitted.]

Avco contends now, as it has contended in the past, that the public safety will be adequately protected upon the issuance of building permits because no such permit will be issued unless Avco has complied with the requirements of the building code in force at the time a permit is sought. Avco further contends that reasonable regulation by the Commissions is also permitted to the extent that it does not deprive Avco of its vested right to the previously approved uses of Tract 7479. What the Commissions fail to acknowledge, however, is that Avco still contends that it has a vested right to the previously approved *use* of Tract 7479.

More specifically, Avco contends that it has a vested right to develop Tract 7479 as a multifamily, multistructure residential development. Although densities have been approved, the location and size of specific buildings have not. Thus, just as Orange County has the right to add a requirement for, say, the installation of smoke detectors before a building permit will be issued, so do the Commissions retain the power to limit the height or location of buildings. However, Avco contends that neither Orange County nor the Commissions can impose new requirements which deprive Avco of its vested right to the previously approved uses of Tract 7479, up to the previously approved densities.

The Commissions argue that there was no evidence which indicates what uses Avco intended for Tract 7479. (Motion to Dismiss or Affirm at 8.) They do this by comparing Tract 7479 to Tract 6988, which Avco intended to develop only to the point of preparing lots for sale to the public, and arguing there is no way the two tracts can be told apart in terms of ultimate use. The Commissions are wrong.

The administrative record ("A.R.") contains objective evidence indicating that Orange County knew the uses which Avco intended for Tract 7479. The tentative tract map for 7479, approved by the Orange County Planning Commission on January 4, 1972, (A. R. Map 10) has the following as Note 2:

> "Proposed Land Use: multiple residential-lots 1, 3-10 inc., 12-19 inc., 21, 22
> Lots 11, 23, 27-Open space
> Lots 2, 20, 24-Recreation
> Lots 25, 26-Single family residental
> Lots A, B, C, D-Private streets"

Thus, there is objective evidence in the record of Avco's intention as to how Tract 7479 was to be developed despite the Commissions' statement to the contrary. The record does not contain equivalent information as to Tract 6988. Moreover, contrary to the Commissions' contention, Avco has not and does not concede that there is no exemption available for Tract 6988. That question was not before the courts of California nor is it before this Court; at no time has it been specifically addressed. However, the Commissions raised this point earlier before the California Supreme Court and, in Avco's letter to the California Supreme Court, dated January 15, 1976, at 8, Avco replied to the Commissions' discussion of the difference between the two tracts by pointing out that Avco bears the burden of showing the extent of its reliance when, and if, it should assert that it is entitled to an exemption for Tract 6988. A copy of page 8 of the January 15, 1976, letter is attached hereto as Exhibit "A" for this Court's information.

III.

The Federal Questions Presently Before This Court Are Substantial and Avco Has Never Held Otherwise.

The Commissions argue that Avco had considered the federal constitutional questions insubstantial and "virtually abandoned them when the matter came up before the California Supreme Court" bringing them to the Court's attention only by means of a letter after oral argument. (Motion to Dismiss or Affirm at 7.)

The Commissions neglect to note that Avco, having lost in the trial court, raised constitutional questions before the Court of Appeal. Having prevailed in the

Court of Appeal, and being required only to respond to the points made in the Commissions' Petition for Hearing to the California Supreme Court (which Petition did not refer to constitutional questions), Avco likewise did not address constitutional questions. Once the California Supreme Court granted a hearing, Avco presented the constitutional questions for that Court's consideration.

IV.

The Record, Which Contains All of the Facts in the Present Action, Does Not Indicate That the Orange County Harbor District Had Received Building Permits for the Beach Portion of Tract 7479.

The Commissions contend that the absence of evidence in the record as to the existence of building permits on the beach portion of Tract 7479 sold to the Orange County Harbor District should be interpreted against Avco. The Commissions also contend that a building permit was probably not needed. (Motion to Dismiss or Affirm at 12.) Both of these contentions are wrong.

Preliminarily it should be noted that the evidence before the courts of California "consisted entirely of the proceedings before the commission . . ." *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 790, 132 Cal.Rptr. 386, 389, 553 P.2d 546, 549 (1976). All of the information on which the Commissions made their decisions—whether to deny the claim of exemption for Tract 7479 or to grant it for the beach portion of Tract 7479—is in the administrative record. The resolutions, which set forth the information forming the basis on which the Commissions made their decisions, may be found in the administrative record at 182-313.

There is evidence in the record which leads to the inference that no building permits had been issued for construction on the beach portion of Tract 7479. The administrative record contains the Commissions' resolutions granting or denying claims of exemption for sixteen tracts. Each resolution sets forth the permits or approvals received. Six of the resolutions specifically reflect the fact that building permits had been obtained. (A.R. at 262, 270, 278, 286, 294, and 302.) There is no mention in the resolution granting the claim of exemption for the beach portion of Tract 7479 of any building permits having been issued. (A.R. at 212.) The absence of such a statement is evidence that no building permits had been obtained.

> "The consideration which we have found rendered the books [produced by the Department of the Treasury] admissible in evidence as tending to prove the truth of the statements of entries contained in them also make them admissible as evidence tending to show that because the receipt of the dividends were not entered in them, they were not received, and therefore were not paid. The evidence may not be as persuasive in the latter case as in the former, but that it was proper evidence to be submitted to the jury for the determination of its value we cannot doubt. Such books so kept presumptively contained a record of all payments made, and the absence of any entry of payment, where it naturally would have been found if it had been made, was evidence of non-payment, proper for the consideration of the jury." *Chesapeake and Delaware Canal Co. v. United States,* 250 U.S. 123, 129 (1919).

See also, 5 Wigmore, *Evidence* §1633(6) at 624 (Chadbourn rev. 1974):

> "Since the assumption of the fulfilment of duty is the foundation of the exception [for public records], it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the *absence of any entry* about them is evidence that they did not occur; or, to put it in another way, the record, taken as a whole, is evidence that the matters recorded, and those only, occurred." [Emphasis in original.]

The inference is, then, that no building permits had been obtained for construction on the beach portion of Tract 7479.

Second, the Commissions' argument as to whether or not a county agency is required to obtain a building permit is sheer speculation and is supported by no evidence whatsoever. Certainly a review of the resolution adopted by the Board of Supervisors of Orange County on September 22, 1971,[1] which did no more than authorize the "acquisition, improvement, and maintenance" of the beach portion of Tract 7479 (A.R. at 408), cannot be taken as evidence of "action amounting to the equivalent of issuing a building permit". (Motion to Dismiss or Affirm at 12.) In summary, there is nothing in the record to support the Commissions' statement that

> "The Harbor District's parcel received county authorization not only for grading the parcel, but

[1]There is apparently a typographical error at A.R. 211 because the date is indicated there as September 21, 1971.

also to build the structures and facilities necessary to make it into a recreational park area, . . . Consequently, an exemption was granted to the County to complete all such structures and facilities." Motion to Dismiss or Affirm at 13.

The evidence, as cited in the Jurisdictional Statement at 21-22, has not been controverted in any way. The conclusion remains that the Commissions, by their actions, have denied Avco the equal protection which the 14th Amendment guarantees to every person.

V.
Conclusion.

For all of the foregoing reasons the Commissions' Motion to Dismiss or Affirm should be denied and probable jurisdiction should be noted.

Dated: February 8, 1977.

Respectfully submitted,

FULOP, ROLSTON, BURNS & MCKITTRICK,
A Law Corporation,
IRWIN M. FULOP,
LAWRENCE R. RESNICK,
Attorneys for Appellant.

EXHIBIT A.

The Honorable Donald R. Wright, Chief Justice, and the Honorable Associate Justices, January 15, 1976, Page 8.

Nowhere is this better illustrated than in Respondents' continued references to Tract 6988, another of Appellant's tracts. Unlike Tract 7479, Appellant intended to do nothing more with Tract 6988 than prepare lots for sale to purchasers who would then construct their own residences. Is there any question that the courts of California are competent to determine the scope of Appellant's reasonable reliance with respect to Tract 6988 if called upon to do so? If the law is that a vested right to construct homes on Tract 6988 would exist only if Appellant had at all times intended to build them itself, is there any question as to whether the courts of California are competent to determine whether Appellant intended to build or to sell to purchasers who would then build? The answer in each case must be no. If Appellant were to claim a vested right to build homes on Tract 6988, it would be Appellant's burden to show that it reasonably relied on Orange County's conduct as an approval of construction of buildings. Notwithstanding the scope of Orange County's approvals, if Appellant's reliance were limited to subdividing Tract 6988, its vested right would also be so limited. In the case at bar Appellant reasonably relied upon Orange County's conduct as an approval of the construction of buildings on Tract 7479 and the Trial Court's factual determination of the existence of the elements of an equitable estoppel reflects this.